

July 25, 2018

JUL 31 2018

Roderick F.H. Fong  
Corporate Agent and President  
Fong Construction Company, Limited  
495 Hukilike Street, Bay 4  
Kahului, Hawai'i 96732

CERTIFIED MAIL, RETURN RECEIPT  
REQUESTED

**Re: NOTICE OF INTENT TO SUE UNDER § 505 OF THE FEDERAL WATER  
POLLUTION ACT**  
**Keokea Kai Subdivision; TMK (2) 2-2-004:014, 094 and 096**

Dear Mr. Fong:

My firm and the firm Damon Key Leong Kupchak Hastert represent Ex. (b)(6); Personal Privacy

[REDACTED] This letter is to provide you and Fong Construction Company, Limited (collectively "you"), as the developer and construction representatives of the owner/developers of Keokea Kai Subdivision, with notice that the Ex. (b)(6); Personal Privacy intend to file a citizen lawsuit against RODERICK F.H. FONG; FONG CONSTRUCTION CO., LTD.; HENRY F.S. FONG; AILEEN LUM FONG; THERESA F. LOCK; FRANCENE F. KIHARA; DEBORAH Y.K. FONG (hereafter, collectively, "Dischargers"). This lawsuit will be brought pursuant to Section 505(a)(1)(A) of the Federal Water Pollution Control Act (commonly known as the "Clean Water Act" ("CWA")), 33 U.S.C. §1365(a)(1)(A). Upon the expiration of the sixty (60) day statutory waiting period, the Ex. (b)(6); Personal Privacy intend to file a civil action (*i.e.* lawsuit) or actions against you.

### LEGAL FRAMEWORK

The civil action will allege that the Dischargers have violated, are violating, and will continue to violate the CWA by failing to obtain coverage under Hawai'i's General Stormwater Permit—or coverage under an applicable individual permit—for construction activities at the Property.

The Clean Water Act is the cornerstone of surface water quality protection in the United States. Sections 301 and 402 of the CWA establish the basic requirement that the discharge of pollutants into water bodies requires a permit before any such discharge is allowed. Section 301 of the CWA provides that "except as in compliance with...section...1342...of this title, the discharge

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of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) Program, which controls water pollution by regulating point sources and industrial, municipal, and other facilities that discharge to surface waters, and provides that “compliance with a permit issued pursuant to this section shall be deemed compliance...with section[] 1311...of this title.” 33 U.S.C. § 1342(k). Further, Section 402 requires permits for any stormwater discharge where “the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2)(E). “Storm water” means storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13).

Once regulated by a NPDES permit, discharges must comply with all terms and conditions of that permit. Permittees who violate the terms of any applicable permit are subject to citizen enforcement actions, and citizens may bring suit against a party discharging pollutants into waters of the United States without a permit. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

EPA has delegated the administration of the NPDES permit program in Hawai‘i to the Department of Health (“DOH”). The Clean Water Branch of the Department of Health, specifically, administers the NPDES permit program for discharges of storm water associated with construction activities, and requires that persons engaged in “construction activities, including, but not limited to, clearing, grading, excavation, and construction support activities that result in the disturbance of one acre or more of total land area” to obtain coverage under a NPDES permit for their stormwater discharges. Hawai‘i Administrative Rules (“HAR”), Chapter 11-55, Appendix C, Section 1.1 (NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activity, effective 12/6/2013). The General Permit also covers “activities that disturb less than one acre of total land area that is part of a larger common plan of development or sale” if the larger common plan will ultimately disturb one acre or more of total land area. *Id.* In addition to coverage under the General Permit, DOH may require any permittee to apply for an individual permit. HAR, Chapter 11-55, Appendix C, Section 2.3.

## VIOLATIONS OF LAW

Dischargers have engaged in significant grading and grubbing activities but have failed to obtain a general or individual permit for the stormwater discharges resulting from their construction activities. Accordingly, Dischargers have violated and continue to violate the CWA as described below.

The Keokea Kai Subdivision (the “Property”) is on the slopes of Haleakala and has two major gulches located within it that flow through numerous downstream properties. The gulches can run like rivers during high rain events.

The Dischargers have long been aware that Federal and State soil specialists were concerned that the Property had a risk of harming downstream properties. In 2008, during the subdivision application process, the Natural Resources Conservation Service wrote the Chair of the Olinda-Kula Soil and Water Conservation District (“SWCD”) and made a number of recommendations, including the following: “We highly recommend this project should be constructed in phases to

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ATTORNEY AT LAW

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reduce and decrease the impact of runoff after construction. As soon grading and construction of each single phase is complete, the area should be stabilized and vegetated.”

In 2010, the SWCD Chair wrote the County of Maui Development Services Administration and again warned of construction activities due to the significant drainages on the Property: “The area has two major drainage gulches through the property. These gulches should not be graded or grubbed during construction. The drainages not only play an important part within the parcel, but for parcels above and below the subject parcel as well.”

On behalf of the Dischargers, you applied for a grading permit in 2015 from the County of Maui, which identified plans for grading of more than five acres of land, including the excavation of 23,825 cubic yards of dirt. However, you and the Dischargers failed to thereafter obtain a NPDES permit from the State of Hawai‘i, as has been confirmed by my office through letters with DOH.

Over approximately the last two years, the Dischargers have conducted extensive grading and grubbing without the required NPDES permit, and also without establishing best management practices required by the County of Maui to mitigate site sediment runoff.

Dischargers have violated and continue to violate HAR, Ch. 11-55, Hawai‘i Revised Statutes, Ch. 342D-50, and CWA §§ 301 & 402; 33 U.S.C. §§ 1311(a), 1342.

### DISCHARGES

Through their construction activities, Dischargers have discharged, are discharging, and will continue to discharge pollutants via construction stormwater runoff into waters of the United States, including, but not limited to, springs, wetlands, streams, irrigation and drainage canals, and coastal waters of the Pacific Ocean.

Dischargers have discharged and will continue to discharge pollutants including, but not limited to, debris, chemicals, sediments, animal waste, and suspended solids; such discharges alter water quality indicator parameters such as turbidity, biochemical oxygen demand and pH. Upon information and belief, downstream water quality exceeds water quality standards in part based on discharges from Dischargers’ activities. Upon information and belief, Dischargers continue to illegally perform construction activities without the coverage of a NPDES stormwater permit.

Dischargers are required to monitor water quality and report such findings to the state and EPA, and are required to report each and every discharge to the state and EPA. Dischargers failed to comply with these and other similar reporting requirements that would be mandated by a NPDES permit.

All violations not set forth specifically in this letter, including specific dates and locations of such discharges, are violations that are or should be known to Dischargers and may be included in any future legal actions by the Ex. (b)(6), Personal Privacy

All specific discharges discovered subsequent to the sending of this notice, of similar type and nature, whether occurring prior or subsequent to this notice, shall be included in the action in this case without the need for further notice under 33 U.S.C. §1365(b). Such discharges may only be known to Dischargers and eyewitnesses who are yet to be determined because such discharges



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have not been, and are not, reported by Dischargers. Other pollutants being discharged not set forth specifically in this letter related to construction activities are unknown to the [REDACTED] but are or should be known to Dischargers and may be included in any future legal actions by the [REDACTED]

As a result of the Dischargers' violation of law, the [REDACTED] the general public, and the environment have been and are continuing to suffer injury. During recent significant rain events massive amounts of mud and debris have exited the Property making the downstream public road used by the [REDACTED] to access their residence unserviceable. Additionally, the runoff has polluted downstream properties, including land owned by the State of Hawai'i, and, upon information and belief, the pollution is entering and affecting Hawai'i coastal waters.

### ACTIONS TO BE TAKEN

The [REDACTED] intend, at the close of the sixty (60) day notice period, to file a citizen enforcement action under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, against Dischargers to address Dischargers' violations of the Clean Water Act as described above.

The [REDACTED] intend to seek declaratory relief, injunctive relief to prevent further illegal discharges, remedial relief and civil penalties for past and continuing violations, and any such other relief as is permitted by law, including costs and attorney and expert witness fees. 33 U.S.C. §§ 1365(a) & (d). Pursuant to Section 309(d) of the CWA and its implementing regulations, The [REDACTED] may seek civil penalties for each day of activity that has occurred without a permit from activities that began in or about 2015 through the date of this letter and all violations of Section 301 of the Clean Water Act, including any further ground disturbing activities, that occur subsequent to the date of this letter. The applicable statutory maximum for civil penalties for each violation is presently \$37,500 per day for each violation. 33 U.S.C. 1319(D) and 40 C.F.R. §19 and § 19.4 Table 1 (or as otherwise provided by federal regulations). Civil penalties are mandatory once violations are found. 33 U.S.C. 1319(c); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (3rd Cir. 1995) (civil penalties under Clean Water Act are mandatory, not discretionary).

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### PERSONS GIVING NOTICE

The names, addresses and phone numbers of persons and counsel giving Notice of Intent to File a Citizen Lawsuit under the Clean Water Act are as follows:

**Ex. (b)(6); Personal Privacy**, through their attorney, identified below:

TOM PIERCE, ATTORNEY AT LAW, LLC

TOM PIERCE 6983

P.O. Box 798

Makawao, Hawai'i 96768

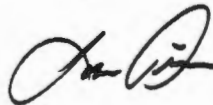
Tel No. 808-573-2428

Fax No. 866-776-6645

Email: [tom@maulandlaw.com](mailto:tom@maulandlaw.com)

Please contact the undersigned if you wish to discuss resolution of the above.

Very Truly Yours,



Tom Pierce

CC VIA U.S. MAIL TO:

Andrew Wheeler, Administrator, U.S. Environmental Protection Agency, Mail Code: 1101A, 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460

Mike Stoker, Administrator, Region 9, U.S. Environmental Protection Agency, Mail Code: ORA- 1, 75 Hawthorne St., San Francisco, CA 94105

Bruce Anderson, Director, State of Hawai'i, Department of Health, 1250 Punchbowl Street, Honolulu, HI, 96813

Director David Goode, Department of Public Works, County of Maui, 250 South High St., Wailuku, HI 96793

**Ex. (b)(6); Personal Privacy**

Kenneth R. Kupchak and Robert H. Thomas, Damon Key Leong Kupchak Hastert